REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL APPEAL NO. 1229 OF 2000

GABRIEL SIMIYU MAKHALE ……APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(From the conviction and sentence of M.A. MLANGA R.M., in Kiambu Criminal Case No. 307 of 2000)

JUDGMENT OF COURT

The appellant, Gabriel Simiyu Makhale, was charged with two counts, at Kiambu Law Courts, of stealing Stock, contrary to section 278 of the Penal Code. He was convicted and sentenced to 7 years imprisonment with 14 strokes of the cane. He appealed against both the conviction and the sentence. During the Prosecution of the appeal, the appellant concentrated on the sentence only although he at one stage in one sentence argued that the evidence upon which the trial magistrate convicted was inconsistent and unreliable and that the prosecution erred in failing to call relevant and material witnesses.

He also argued that the interpreter was biased and failed to interpret what some witnesses and he, said at the lower court. He also said that the probation officer did not investigate all the aspects of his background, which could have been favourable to him, which prejudiced his case during the sentencing. In reply, the A.G. through Mr. Kivihe, opposed the appeal and responded to all the grounds raised by the appellant as above-mentioned.

The brief facts of the prosecution case in the lower court is that on 18.1.2000, PW1, one of the complainant got a report that his eight goats had been stolen but on checking he confirmed that only two had been actually stolen. The appellant was found by the complainant, standing where his goats were grazing. He arrested the appellant, who led him and others in his company into a nearby coffee plantation where the goats and two sheep were recovered.

The complainant then proceeded to make a report at Kiambu police station from where he was accompanied by a police officer to the scene of crime. The accused was then escorted to Kiamumbi police post together with the two goats and two sheep. The next day on 19.1.2000 PW2, Paul Murage went to Kiamumbi police station on being tipped that his two sheep had been stolen. He identified his two sheep there and saw two goats there. He had permission to and took home his two sheep. He did not find the appellant who, he learnt, had been escorted to Kiambu Police Station. PW3, Andrea Mutio Maluku had tied goats and two sheep belonging to PW2 outside PW2's house before they apparently disappeared from there several hours later. He later saw people ran into the coffee plantation where the sheep in question and two goats were found. He there saw the appellant under arrest who was arrested when the police came. PW4, Njuguna Njoroge, testified that he found the appellant untying a goat but arrested him when

he tried to run away. He then led him and others present into the coffee plantation where two goats and two sheep referred to above were found. PW5, No 67421, P.C. Harun Kinywa, got a report of the theft from PW1 and accompanied him to the coffee plantation where he saw two goats identified by PW1, the two sheep referred to hereinabove, and two hens, one dead and the second alive. He rearrested the appellant and escorted him to Kiambu Police Station together with the goats, the sheep and the hen. The second hen died before arrival at the police station. PW6, a boy of 12 years called Peter Njoroge, saw the appellant untying his father's goats as they grazed at a bush where they had been tied earlier. He saw the appellant escort those he untied into the coffee plantation. He went and reported to someone else whose name he did not state in the evidence. In his defence, the appellant had given an unsworn statement in which he concentrated mainly on how he was arrested on 8.1.2000 in company of two women who were escorting him from Roysambu.

He carried K.shs.7000/-, which PW2 who was his employer in construction work had paid him after they had finished constructing a house. The reason for his arrest, he stated, was that he was taking away the two Kikuyu women who were found escorting him. Those who arrested him were 15 men who also took away his K.shs.7000/- paid to him earlier by PW2 herein. They tied him in the coffee plantation until 2.00 p.m. when he managed to drag himself to the road where he was untied by a group of people who were driving by on a tractor. As they travelled along PW2, whom he called Ndung'u, handed him to a watchman. He then led the group into a coffee plantation after interrogation and therein some people alleged that, he the appellant, was a thief. He was then according to him taken to Kiamumbi and later to Kiambu police station where from he was charged with stock theft in Kiambu Court. He alleged the existence of a grudge between him and Ndung'u, PW2 according to him since the latter was now keeping his girl-fried. He concluded by asserting that the child who had seen him steal the stock is not the one who came to give evidence before the lower court.

The trial Magistrate considered the above evidence, which, in my opinion, he considered very carefully. He found it sufficient and relying on it, he convicted the appellant. I have carefully examined the evidence and how the trial magistrate treated it as well as how he came to his conclusions. The appellant did not really try to contradict the evidence coming from all the witnesses. He did not say that the evidence was untrue in any way. In particular he did not say that he was not arrested near the stock nor did he deny leading the main witnesses into the coffee plantation where he showed them the two goats and the two sheep, the subject of the offences charged.

Although by alleging different circumstances of his arrest and alleging that he was arrested on 8.1.2000 not 18.1.2000, and thus implying that the prosecution witnesses were telling lies, the evidence to the effect that he was arrested on 18.1.2000 was overwhelming. In my view, the evidence that the appellant was found untying the goats and that when he was arrested he led his captors into the coffee plantation where PW1's two goats and PW3's two sheep were found was overwhelming and was credible. He did not then nor in the lower court later attempt to exonerate himself from being the person who tied the stock in the coffee plantation by an express denial to that end. He claimed in his defence that the boy who saw him untying the goats and went to report to PW4, was not the one who testified against him in court, thus implying that he was indeed seen doing so but by a different boy. Without making this appellant's claim the basis of the conviction, the same being considered together with the rest of the overwhelming positive evidence on the record, in my opinion, was sufficient to lead the trial magistrate to the conclusions he reached. I accordingly hold that the trial magistrate was entitled to convict the appellant on the 1st count of stock theft related to the two goats.

In relation to the 2nd count of stealing the two sheep belonging to PW2, however, I find it difficult to understand as to how the trial magistrate concluded that he appellant was the one who unlawfully and without the knowledge and consent of PW2, took away the two sheep. There is no evidence on the record as to how the two sheep were taken away from where they had been tied for the purpose of grazing by PW3, Andrea Mutio Maluku nor is there eye-witness evidence that the appellant is the one who untied them and took them into the coffee plantation where they were later recovered from in the presence and help from the appellant. Without further consideration by the trial magistrate, the appellant should have been acquitted of the 2nd count. However, the evidence on the record clearly confirmed that the appellant, taking into account all the circumstances of the case, was in possession of the two sheep, which had been

removed from where they had that morning been tied for grazing. This is because he led the relevant witnesses to the immediate presence of the two sheep. Thus it can safely be presumed that he knew how the sheep were taken there and that he must have played a positive role in placing or keeping them there otherwise he would not have known of their presence there. He accordingly, as a matter of fact, was in possession of recently stolen stock in respect of which the law of evidence and the substantive law of theft, required him to give a satisfactory explanation to the final effect that he came into the possession thereof innocently. The trial magistrate failed to direct his mind to this principle often referred to as the principle of "recent possession." Under it any person who is found in possession of a recently stolen property has a legal obligation to give a satisfactory explanation that he came into possession innocently, otherwise the law would presume him to be the person who stole the property or that he is a handler of the said property. In this case the appellant, as concluded above, was found with a very recently stolen two sheep. He failed to give an innocent explanation as to how he came into possession. The court, as should have the trial court, finds that he was the one who had stolen them from where they had been tied to graze. This court accordingly under section 354 of the Criminal Procedure Code hereby confirms the conviction in respect to count two.

The upshot of the canvassing herein therefore, is to confirm the convictions to both counts in respect of which the trial magistrate convicted the appellant.

The appellant in arguing his appeal concentrated in the sentence, which he termed harsh and excessive. He raised several mitigating factors tabulated at the beginning of this judgment, which included the fact that the Probation Officer who was instructed by the court to investigate the appellant's background, failed to investigate certain aspects which would have ended in his favour and which might have convinced the trial court to order the appellant to be placed on probation. I have carefully noted the mitigation which the appellant raised before he was sentenced by the lower court. It amounts to very little indeed. The appellant must have tickled the lower court when he prayed for leniency on the ground that he eats too much due to his large stomach and that this might lead him to suffering if given a custodial sentence. I believe that in his own way he convinced the lower court to call for a probation report. He failed to record proper mitigating factors, which he funnily put on record in his favour before me . He here indicated that his age is over 56 years and therefore unfit to receive the 14 strokes of the cane; that he has proven of good conduct in prison and had been given a written commendation at Naivasha but had unfortunately not been able to receive it and was not therefore able to present it before this court.

The State conceded that his age may not allow the execution of the corporal punishment. Going at his heart-rending tickles again, he made this court break into deep laughter when he implored the court to use its "sentencing sword" to let "the sword not to cut deep" but to "let it fall on the flat side." I have carefully considered the sentence meted out. In my view court had been very reasonable in approaching the sentencing by first seeking for a probation report, which was later produced. In seeking for the report the trial magistrate clearly wanted to be lenient. The probation officer's report, however, showed that the appellant was not a person who might benefit by being spared a custodial sentence. Information indicated that he was reputed to be a stock thief in and around where he resided although he had never been arrested or charged before then. Although the report was unfavourable , however, no concrete proof was tendered by the Probation Officer and probably the trial court should still have been more lenient than it was. The appellant was a first offender, which that court did not appear to have taken into consideration. His age was not also considered. The stolen stock whose value was only 6000/- were recovered. The appellant's 7000/- was probably stolen from him. The fact that he has been of good conduct in prison and that he has so far served a period of about 21/2 years was not contradicted by the State Counsel for the Attorney- General. The above reasons would entitle this court to, if necessary, interfere with the sentence. It is the view of this court that due to corporal punishment imposed and its unsuitability, this court must interfere with the present sentence. Taking the opportunity into account and considering all the other favourable factors to the appellant, it is the opinion of this court that the circumstances of this case will best be served by reducing the present sentence from seven years and 14 strokes of the cane to five years imprisonment without corporal punishment due to age. This to take effect from the original date of sentencing, which is 6.10.2000. It is so ordered and to that extent this appeal is so allowed.

Dated and delivered at Nairobi this 29th day of April 2003

D.A. ONYANCHA

JUDGE